

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

GERALD PITTMAN,

Plaintiff,

Case No. 07-14892

v.

Hon. John Corbett O'Meara

RICHARD KOLB,

Defendant.

**ORDER DENYING DEFENDANT'S MOTION  
TO TAKE DE BENE ESSE VIDEOTAPED DEPOSITION**

Before the court is Defendant's motion in limine to take de bene esse videotaped deposition for use at trial, filed July 3, 2012. Plaintiff filed a response brief on July 6, 2012. The court did not hear oral argument.

Defendant seeks to take the deposition of non-party witness Aldo Sam Gallina for use at trial. Gallina is a former prisoner who is currently living in Dearborn, Michigan. Defendant contends that Gallina would have difficulty arranging transportation to Ann Arbor and missing work for trial.

Federal Rule of Civil Procedure 32(a)(4) provides that a party may use a deposition at trial if the witness is "unavailable" (e.g., dead; more than 100 miles from the courthouse; ill, elderly, infirm, or imprisoned; or his attendance cannot be procured by subpoena). The rule also provides that a deposition may be used if "exceptional circumstances make it desirable – in the interest of justice and with due regard to the importance of live testimony in open court – to permit the deposition to be used." Fed. R. Civ. P. 32(a)(4)(E). "The party seeking to admit a deposition at trial must prove that the requirements of Rule 32(a) have been met." Allgeier v.

United States, 909 F.2d 869, 876 (6<sup>th</sup> Cir. 1990).

Defendant has not demonstrated that Gallina is “unavailable” or that exceptional circumstances exist under Rule 32(a)(4)(E). See Allgeier, 909 F.2d at 876 (busy doctor not “automatically unavailable” under Rule 32). The court understands the inconvenience of appearing at trial; however, this is true for most witnesses. Moreover, there is no evidence that Gallina’s attendance at trial cannot be procured through a subpoena.

Accordingly, IT IS HEREBY ORDERED that Defendant’s motion in limine to take de bene esse deposition is DENIED.

s/John Corbett O’Meara  
United States District Judge

Date: September 4, 2012

I hereby certify that a copy of the foregoing document was served upon counsel of record on this date, September 4, 2012, using the ECF system.

s/William Barkholz  
Case Manager